Supreme Court, U.S.
FILED

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No. 98-860

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In the

Supreme Court of the United States

October Term, 1998

MARCUS S. MINIX,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY;
KENTUCKY SUPREME COURT; AND
SHERRY MINIX (NOW WOLF)

Respondents.

ON APPEAL FROM SUPREME COURT OF KENTUCKY
98-SC-52-D

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a scheme for the assignment of special judges under a private, unpublished administrative order known as the "Regional Administration Charter" violates the Due Process Clause by failing to afford safeguards for the assignment of an impartial judge ab initio to a civil or criminal proceeding, due to an unconstitutional combination of executive and judicial functions, a lack of promulgation or notice to the public of rules, and a lack of a right to an appeal.

2. Whether the constitutional deprivation experienced by the Petitioner which were never addressed or corrected by the state because of a refusal to review or consider the issue must be given a meaningful review and analysis.

3. Whether every parent has a fundamental liberty interest in the custody of his or her children during divorce proceedings that requires a trial that passes muster under the due process and equal protection clause of the Constitution.

4. Whether every divorcing parent has the right of an appeal from a final custody determination rendered by a judge without jurisdiction that at a minimum meets minimum due process and equal protection clause of the Constitution.

5. Should due process be obliged, for purposes of a prospective child custody order, to give substantial weight to the long-term status which would have remained in effect absent an intervening ab-initio jurisdictionally void, modification order entered by a judge without jurisdiction, appointed as a direct result of court procedures instituted by fiat, without any observance of minimum due process requirements?

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Marcus S. Minix ("Minix") petitions for a writ of certiorari to review the discretionary denial by the Kentucky Supreme Court to review the Opinion of the Kentucky Court of Appeals.

OPINIONS BELOW

The Order of the Kentucky Court of Appeals dated the 7th day of November, 1997 is reproduced herein in Appendix A. The Order of the Kentucky Supreme Court dated August 26, 1998 denying discretionary review of the Order of the Kentucky Court of Appeals is reproduced herein in Appendix B.

The Order of issuance of mandamus by the Kentucky Court of Appeals dated January 19, 1995 that determined the Petitioner's divorce case was presided over for six years by a prejudiced judge who had no jurisdiction is reproduced herein in Appendix C. The Opinion affirming the issuance of that mandamus by the Supreme Court of Kentucky dated August 24, 1995 is reproduced herein in Appendix D. None of these decisions are reported.

It is the denial of relief in the Kentucky Court of Appeals' Order, as the same was refused review by the Supreme Court of Kentucky, for which review is sought.

JURISDICTION

The Order by the Kentucky Supreme Court dated August 26, 1998 and the Order by the Kentucky Court of Appeals dated November 7, 1997 did not grant Petitioner the relief that he had requested. App. A and App. B. This Court has jurisdiction under 28 U.S.C. §1257, 28 U.S.C. §2104 and 28 U.S.C. §2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, §2 of the U.S. Constitution limits the judicial power of the federal courts to all "cases" and "controversies."

28 U.S.C. Sec. 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside, or reverse any judgment, decree, or order of a court lawfully brought before it for review and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. Sec. 2104 provides:

> An appeal to the Supreme Court from a State court shall be taken in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree appealed from had been rendered in a court of the United States.

28 U.S.C. Sec. 1257(a) states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute or any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or law of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

In 1986, the Petitioner ("Minix") filed for divorce Sherry Minix (now Wolf)("Wolf") in the Johnson Circuit Court, Paintsville, Kentucky. The case was first assigned to Judge Stephen N. Frazier who voluntarily disqualified because of the personal relationship between himself and his wife with Wolf.

Because the Johnson Circuit Court has two circuit judges, the case was then assigned by Kentucky Supreme Court Rules to the other circuit judge, Judge James A. Knight. In 1988, Judge Knight granted dissolution of marriage and joint custody of the parties' two-children. The joint custody orders required the children to remain in their hometown of Paintsville, Kentucky.

In January 1989, Attorney Anna Melvin, Esq., began Wolf's legal representation. Melvin is the niece-in-law of Judge Knight and had just finished clerkship under Judge Knight. Judge Knight therefore voluntarily disqualified and the need arose for the

assignment of a special judge in the Johnson Circuit Court.

Against valid court orders Wolf abducted the parties' older daughter, Megan-- then six years old, from Paintsville Grade School and relocated to Boyd County, Kentucky - approximately two-and-one-half hours round-trip drive away from Johnson County. The parties' younger daughter, Melissa—then four years old, remained with Minix in Paintsville, Johnson County.

Minix filed a motion for sole custody and to hold Wolf in contempt of Judge Knight's orders. Wolf filed a motion for sole custody and for permission to modify joint custody by removal of both children away from their father and Paintsville to Ashland, Boyd County, Kentucky. These issues are hereinafter referred to collectively as the "right to remove children under joint custody".

On January 18, 1989, Judge Frazier without right in law unilaterally asserted authority to appoint a new special judge. Seven days later on January 25, 1989 he appointed himself as special judge, in spite of his admitted bias.

On September 7, 1989, another special judge Edward Manual briefly made an appearance in the case and entered an order denying Wolf's motion to remove the children from Paintsville. Judge Frazier, although disqualified, reasserted himself in the case and in May 1990 sustained Wolf's motion to remove the children under joint custody. Additionally, Judge Frazier reduced Minix's physical custody of his children by 1/3 and Minix was required to provide all of transportation for his visitation, about 12,000 miles per year.

On May 17, 1991 after addressing the merits of the case, Judge Frazier voluntarily disqualified a second time and assigned Judge Kelley Asbury of the Boyd Circuit Court as special judge.

In the fall of 1992, Minix discovered the existence of an unpublished scheme of assigning special judges known the Regional Administration Program Charter ("Charter"). The Charter was instituted by fiat by the Kentucky Supreme Court Chief Justice in violation of the Kentucky Constitution. Minix had to locate the existence of the Charter by identifying its entry date, and then purchasing a copy from the Clerk of the Kentucky Supreme Court. He discovered that Judge Frazier was expressly prohibited the authority to assign any judge, including himself, to a case from which he had disqualified. Minix then began a series of state court actions arguing the Constitutional deprivations he had suffered of his protected liberty interest in a fair and impartial trial caused by the Charter and Judge Frazier. Because of the secrecy and lack of promulgation of the Charter, Minix charged it violated the Due Process Clause.

Eventually, Minix successfully filed a *pro se* original action in the Kentucky Court of Appeals for a "Petition for Writ of Mandamus", Case No. 94-CA-2820-OA, wherein: (1) Judge Frazier responded by admitting his voluntary disqualification; (2) the Chief Justice of the Kentucky Supreme Court on December 5, 1994 appointed Hon. Charles E. Lowe, Jr. of the Pike Circuit Court as special judge; and (3) the Court of Appeals issued mandamus on January 19, 1995 voiding all of Judge Frazier's orders *ab initio* of disqualification under Wade v. Bondurant, Ky., 625 S.W.2d 847 (1981) and Weddington v. Lair, Ky., 404 S.W.2d 451 (1961). Minix's allegations of Constitutional deprivation however were never analyzed or redressed.

Minix unsuccessfully continued his contentions of Constitutional deprivation before special Judge Lowe. On May 25, 1995, Special Judge Lowe entered an order which, in essence, validated the original unlawful act of the removal of Minix' children under joint custody even though Wolf had appealed the

issuance of the writ of mandamus to the Kentucky Supreme Court. Minix filed a cross-appeal in the Kentucky Supreme Court contending, *inter alia*, his constitutional right to restoration of the rights and entitlements which he had been illegally deprived of by years of void orders; for a trial of the right to remove the children under joint custody; and that the Charter violated the Due Process Clause.

During the pendency of the appeals, Minix filed a trial court motion in May 1995 before special Judge Lowe to modify the joint custody orders of Judge Knight based upon the "cooperation standard" between parents in the upbringing of their children instituted in Squires v. Squires, Ky., 854 S.W.2d 765, 769 (1993). A three day hearing was held wherein Minix presented evidence of Wolf's non-cooperation, proven by: (1) three policemen who testified that Wolf had withheld numerous periods of Minix's physical custody; (2) Wolf admitted working full-time and leaving the children "home alone" during her employment; and (3) evidence proved that Wolf was out of Kentucky one to two weeks monthly on buying trips in connection with her employment, again leaving the children under the care of someone other than their parent.

The Kentucky Supreme Court on August 24, 1995 affirmed the issuance of mandamus without analyzing, addressing or correcting Minix's Constitutional deprivations. Minix filed a petition for a writ of certiorari that was denied on August 26, 1998 in 98-SC-52-D.

Minix filed a motion before special Judge Lowe for habeas corpus and for an emergency hearing in an effort to have the special judge comply with the issuance of mandamus. On December 13, 1995, special Judge Lowe adopted the Findings of Fact, Conclusions of Law, and Order tendered by Wolf's counsel

and entered it in the record as his own. The order did not make any findings of fact, conclusions of law, or order regarding removal of the children from Minix and Paintsville, nor did it address Minix's demand for redress of his due process deprivations by restoration or a trial of the expatriation of the children under void orders.

Minix had moved special Judge Lowe to restitute him to the status quo ante six years of void orders by motion dated January 30, 1995 and memorandum filed January 5, 1995.

On June 4, 1996, Minix's motion to alter, amend, or vacate was overruled. Minix appealed and on November 7, 1997, the Court of Appeals affirmed winning counsel's decision as a "de novo" child custody hearing and once more did not analyze Minix's claims of Constitutional deprivation. Minix's Petition for Rehearing requesting a trial that for the first time met the 14th Amendment requirements of due process concerning the right to remove the children from him and Paintsville, and this was overruled on December 31, 1997.

Finally, Minix's Motion for Discretionary Review requesting a trial that met minimum due process requirements on the right of Wolf to remove the children under void orders, and Minix contended again that the Charter itself violated the Due Process Clause. This was again overruled by the Chief Justice of the Kentucky Supreme Court on August 27, 1998.

REASONS FOR GRANTING THE WRIT

1. EVERY CITIZEN OF THE UNITED STATES HAS THE FUNDAMENTAL RIGHT TO THE ASSIGNMENT OF AN UNBIASED JUDGE VESTED WITH VALID JURISDICTION DURING EVERY PHASE OF A CASE.

The constitutional and federal questions were presented but

never addressed by the State.

Petitioner claimed abrogation of various rights, privileges, and immunities under the federal constitution, 28 U.S.C.§ 1257(3) and 28 U.S.C.§ 2103. Petitioner challenged the validity of the Charter as repugnant to the Due Process Clause on the basis of lack of formal notice and the union of executive and judicial functions. In view of the public importance of the questions presented, jurisdiction is vested in this Court. 28 U.S.C.§ 1257(2); Raley v. State of Ohio, 79 S.Ct. 1257, 1265 (1959). There can be no question as to the proper presentation of a federal claim when the highest state court passes on it. Raley at 1265; See: 34 S.Ct. 874.

2. A SCHEME KNOWN AS THE "CHARTER" VIOLATES THE DUE PROCESS CLAUSE BY FAILING TO PERMIT THE ASSIGNMENT OF AN IMPARTIAL JUDGE IN THE FIRST INSTANCE.

In Ward v. Village of Monroeville, 409 U.S. 57, 93 S. Ct. 80 (1972), the U.S. Supreme Court struck down the particular union of executive and judicial function where the forbidden "possible temptation" was present "when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." Id., 409 US 57 60, 61, 93 S.Ct. at 83. See also Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927).

In the present case, succumbing to "possible temptation" is demonstrated in Judge Frazier's self-appointment as special judge to address the merits by reversing the child custody orders of Judge Knight orders in favor of the party because of whom he had initially disqualified –i.e. Wolf -- before assigning Judge Asbury to the case. Ward held that the statute for the disqualification of interested, biased, or prejudiced judges "requires too much and

protects too little". Id., 93 S.Ct. at 83. Ward speak to the manner in which the Charter combines authority within a single judge. The Charter's regional administrator is both a judge who rules on disputed factual questions in both civil and criminal cases and an executive who assigns special judges, including himself. Such a union concentrates too much power in one judge when he wields the power to determine a justifiable cause which can and did result in void orders.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." Marshall v. Jerrico, Inc., 100 S.Ct. 1610, 1613 (1980). The Charter's scheme of injecting knowledge of the facts of a judicial proceeding into the assignment of a special judge to make the decision raises serious Constitutional questions. This biasing influence demonstrates that such a union violates the constitutional constraints applicable to the executive decisions of assigning special judges and must be quashed. The Charter's unfettered discretion disables the safeguards adopted by the People in violation of the Due Process Clause.

Even if the Charter were valid, Minix contends that failure to promulgate it denied Minix --and continues to deny every United States citizen subject to court proceedings in the Commonwealth of Kentucky-- liberty in the safeguard protection to notice of the Charter's provisions. See for example Miranda v. Arizona, 384 U.S. 436 (1966)(notice is intrinsic for both the law enforcement agent and the recipient). Therefore, at minimum, the Charter as with all laws and legal procedures must be lawfully promulgated. The lack of publication of the Charter or right of appeal from a decision therefrom begs for abusive action such as was actually experienced by Minix.

The deprivation Minix experienced – i.e, failure of the appointment of a qualified special judge in the first instance -- was predictable. A pre-deprivation process for the appointment of a special judge was adopted by the People of Kentucky in 1976 wherein the Chief Justice of the Kentucky Supreme Court was entrusted to assign special judges under Kentucky Constitution Section 110(5)(b), effective January 1, 1976. This process was enabled by the Kentucky legislature's enactment of KRS 26A.020(1) and KRS 26A.015(3)(a) which provide that the trial court clerk refers the need for the assignment of a special judge to the Chief Justice. Minix's deprivation would have been prevented if the People's safeguard had been followed.

3. THE DEPRIVATION EXPERIENCED BY THE PETITIONER WAS NEVER CORRECTED BY THE STATE BECUASE IT WAS NEVER ANALYZED.

Because Minix's contentions of Constitutional deprivations were never analyzed by the state, they were never corrected.

The U.S. Supreme Court has determined that a Court "examine[s] procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the state[;] the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460 (1989). See also Duchesne v. Sugarman, 566 F.2d 817, 824 (1977)(parent deprived of procedural due process by removal of children by state) citing Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

Minix was deprived of his protected liberty interest in an impartial and disinterested tribunal in the trial of the right to remove his children from him under joint custody.

It is well settled that a parent has a protected liberty interest in the custody of his children that cannot be terminated without a compliance with the requirements of due process. Hooks v. Hooks, 771 F.2d 935 (6th Cir. 1985); Vinson v. Campbell County Fiscal Court, 820 F.2d 194 (6th.Cir.Ky.1987); Elam v. Montgomery County, 573 F.Supp. 797, 802 (S.D. Ohio 1983); Huynh Thi Ank v. Levi, 586 F.2d 625, 632 (6th Cir. 1978); 42 U.S.C. § 1983. There can be no question that this liberty interest extends to Minix.

Because Minix has the protected liberty interest in the custody of his children, the state must afford Petitioner procedural due process. The remaining question is "the nature of the process that is due . . " Duchesne, supra, at 824.

4. IN A STATE COURT DIVORCE PROCEEDING, EVERY PARENT HAS A PROTECTED LIBERTY INTEREST IN EQUAL PROTECTION AND A TRIAL IN THE CUSTODY OF THEIR CHILDREN.

Because Judge Frazier's orders are void *ab initio*, Wolf's removal of the children from Minix and Paintsville was not judicially authorized from the very beginning.

It must be concluded, as a matter of due process of law, that Minix as a parent was entitled to a trial of the removal of the children, the reduction of his time with them, and the requirement that he provide all of the round-trip transportation before his children were taken from him and Paintsville. Instead, Minix egregiously suffered the physical custody loss of his children for five years under void orders. The regrettable fact is that the continued delay in correcting the error has unfortunate effects on the relationship between the innocent children, their father, and their paternal extended family.

Minix believes that the right of individual citizens to be secure from the trouble, expense, anxiety, and deprivation of liberty and property caused by the disqualified litigation before a disqualified judge who renders void orders, must be justly regarded as one of the securities against malicious and oppressive governmental action. Yet, to date, the state has not considered any remedy for Minix's loss. Minix requests this Court to permit him the remedy he requested by restoration or *habeas corpus* of the children to the rights and titles in Judge Knight's orders of which he had been illegally deprived and for the opportunity of a trial on the right to remove children under joint custody. Further, Minix requests this Court permit him his request for the restitution of the money he expended during non-qualified litigation.

The U.S. Supreme Court, in the case of parental termination of an unwed father, held that individualized proof is necessary to establish his unfitness to the custody of his children. Stanley v. Illinois, 405 U.S. 645 (1972). See also Bell v. Burson, 402 U.S. 535 (1971).

In the present case, Wolf was not required to bear any burden of proof that it was "in the best interest of the children" to be relocated from their father and their hometown of Paintsville as required under Kentucky Revised Statutes (KRS) 403.270-.340. The state never entered findings of fact, conclusions of law, or order granting Wolf judicial authorization to remove the children from Minix and Paintsville. The requirement that Minix drive between Paintsville and Ashland without an order that he do so is governmental oppression.

In Ward, supra, this Court held that "A statutory provision for the disqualification of interested or biased judges did not afford petitioner a sufficient safeguard, and it is of no constitutional relevance that petitioner could later be tried de novo in another

court, as he was entitled to an impartial judge in the first instance." Ward, supra, 409 U.S. at 59-62.

The state denied Minix any trial much less a fair and impartial one. Minix requests this Court recognize that the consideration of any custodial arrangement wherein the children continue to remain in Ashland under voided custody orders gives Wolf particular advantage on whether the children should be removed. Simply, by continuing to permit Wolf to retain the children in Ashland away from their father and Paintsville without judicial authorization, deprives Minix of a fair review of the removal issues and continued alienation.

It must also be concluded, as a matter of due process of law, that by denying Minix a trial and extending it to all other parents whose custody of their children is challenged, the State denied Minix the equal protection of the laws guaranteed by the Fourteenth Amendment. Kentucky Law specifically holds that the right of one parent to relocate the children from the other parent requires application of the "cooperation" standard announced in Squires v. Squires, Ky., 854 S.W.2d 765 (1993). Stinnett v. Stinnett, Ky. App., 915 S.W.2d 323 (1996) aff. Mennemeyer v. Mennemeyer, Ky.App., 887 S.W.2d 555 (1994).

The state cannot simply claim that there can be no trial of the removal of his children simply by failing to provide one. Nor can the state claim that there can be no remedy for the loss Minix suffered in the physical custody of his children under void orders by failing to provide one. Minix believes that the state has not only the ability, but the duty to re-establish the attachment of the children with their father and hometown which was damaged by the illegal separation under void orders and then apply Kentucky Law in Squires, Stinnett, and Mennemeyer, supra.

CONCLUSION

Petitioner's writ of certiorari to the United States Supreme Court should be granted because all citizens of the United States should be guaranteed their federal Constitutional liberty interest in to the assignment of a qualified special judge in the first instance in Kentucky, and a parent has a right to a fundamentally fair trial in the custody of his children presided over by an unbiased judge vested with jurisdiction.

Without review from this court, the Petitioner will continue to suffer deprivation of possession and control of his daughters who were removed from and never returned to him by virtue of void acts of a judge without jurisdiction, appointed by a unpromulgated Charter that affords no due process protections that the Constitution requires.

Separately, without intercession by this honorable court, the Petitioner and all persons similarly situated will continue to be subjected to the application of substantive as well as procedural rules and administration of the Charter without any prior notice of the existence or substance of the Charter, as well as the procedural right or opportunity to under the Charter to act to seek relief.

Respectfully submitted,

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RENDERED: November 7, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 96-CA-001880-MR

MARCUS S. MINIX — APPELLANT

APPEAL FROM JOHNSON CIRCUIT COURT
V. HONORABLE CHARLES E. LOWE, JR., SPECIAL JUDGE
ACTION NO. 86-CI-10

SHERRY MINIX (now WOLFE) — APPELLEE

OPINION

AFFIRMING

** ** ** ** ** ** **

BEFORE: EMBERTON, HUDDLESTON and MILLER, JUDGES.

HUDDLESTON, JUDGE. Marcus S. Minix appeals from a Johnson Circuit Court decision awarding custody of their minor children to Sherry Minix Wolfe. Minix challenges the validity of proceedings conducted and orders entered by the trial court. He further seeks a change in physical custody of the parties' minor children, financial restitution, and removal of the special judge assigned to preside over the case.

Minix and Wolfe were married on January 30, 1982. The marriage produced two daughters, Megan, born September 21, 1982, and Melissa, born March 23, 1985. Divorce proceedings were initiated on January 8, 1986. The case was initially assigned to Judge Stephen Frazier; however, in September 1987 Judge Frazier voluntarily disqualified himself. The case was then assigned to Judge James Knight. During 1987 and 1988 Judge Knight issued various temporary orders addressing, inter alia, child custody and visitation. In January 1989 Judge Knight disqualified himself, whereupon Judge Frazier, acting in his capacity as Chief Regional Circuit Judge, reassigned himself to the case. In May 1990 Judge Frazier granted appellee's motion for sole custody and for permission to remove the children to Ashland, Kentucky. On May 17, 1991, Judge Frazier again disqualified himself. Judge Kelly Asbury of Boyd Circuit Court was subsequently appointed to preside.

In November 1994, appellant initiated a mandamus action pursuant to Ky. R. Civ. Proc. (CR) 76.36 objecting to Judge Frazier's 1989 reappointment of himself and seeking to have any orders issued during his second tenure declared void. Shortly thereafter Judge Asbury disqualified himself. In December 1994 Chief Justice Robert Stephens appointed Judge Charles Lowe of the Pike Circuit Court as special judge to preside over the case. On January 19, 1995, this Court granted appellant's mandamus petition and issued an order directing Judge Lowe to enter an order vacating all orders and judgments signed by Judge Frazier subsequent to his first voluntary disqualification of himself. This order was affirmed by the Kentucky Supreme Court on August 24, 1995. On May 25, 1995, Judge Lowe issued an order addressing, inter alia, child custody and visitation. Throughout the remainder of 1995, litigation continued. On December 13, 1995, the trial court awarded primary physical custody of the children to Wolfe. On January 2, 1996, Minix filed a motion to alter, amend, or vacate the December 13, 1995, order. On June

4, 1996, the trial court denied this motion. This appeal followed, although litigation in the trial court continues.

Minix raises eight issues on appeal. The fundamental issue of this proceeding, however, is the welfare of Megan and Melissa. Inasmuch as the remaining issues are peripheral to this question, we first consider appellant's argument that the trial court erred by denying him sole custody. In support of his argument Minix cites, instances of Wolfe withholding visitation, potential endangerment by neglect, endangerment from unstable home place, and mental health endangerment. These allegations are rejected by the findings of the trial court.

In its December 13, 1995, order the trial court states that it is unable to find any area of development of these children for which it would criticize the efforts of Wolfe. We may not set aside a trial court's finding of fact unless we determine that the finding is clearly erroneous. CR 52-01; Karahalios v. Karahalios, Ky.App., 848 S.W.2d 457, 459 (1993). The trial court concluded that the children desire to remain in the primary physical care of their mother and found it to be in their best interest that Wolfe have primary physical custody.

Great weight must be given to the findings of the trial court concerning custody of a child; its conclusions will not be disturbed except where the court has abused its discretion. Watson v. Watson, Ky., 434 S.W.2d 33, 35 (1968). We will not substitute our judgment for that of the trial court unless a manifest abuse of discretion has occurred. Smith v. Smith, Ky., 429 S.W.2d 387, 391 (1968); Borjesson v. Borjesson Ky., 437 S.W.2d 191, 193 (1969). Here the trial court did not abuse its discretion. It follows that the trial court did not err in denying appellant custody. Further, we agree with the trial court that the interest of Megan and Melissa is best served by remaining in the primary physical custody of their mother.

Minix raises a number of peripheral arguments unrelated to the best interest of his children. He first argues that Judge Lowe's orders which "maintained the status quo" of Judge Frazier's orders after those orders had been ordered vacated was an act of contempt and an abuse of discretion and that Judge Lowe erred in failing to relieve him from Judge Frazier's void orders. On February 8, 1995, Judge Lowe, pursuant to the January 19, 1995, directive of this Court, entered an order vacating all orders and judgments entered by Judge Frazier. Judge Lowe did not reinstate the orders of Judge Knight, nor did our opinion direct him to do so. It was not an abuse of discretion for Judge Lowe to conduct a de novo best interest analysis based upon current circumstances.

Courts cannot possibly anticipate future changes in either the conditions or habits of parents, consequently any child custody award is subject to modification. Stupp v. Gross, Ky., 190 S.W.2d 869, 872 (1945). The trial court has broad discretion on matters of child custody. Grider v. Grider, Ky., 254 S.W.2d 714, 715 (1953). In child custody proceedings, the best interest of the child is the overriding issue. Eviston v. Eviston, Ky., 507 S.W.2d 153 (1974). Minix's suggestion that the children should have been summarily ordered returned to him in Paintsville is in direct contravention to this basic principle. The children had, by January 1995, lived in the Ashland area for approximately six years. Judge Lowe's approach to this case was proper and his best interest determinations have now superseded Judge Knigjit's obsolete orders. Minix's allegation that Judge Lowe's conduct was an "act of contempt" is untenable. Contrary to Minix's allegations, Judge Lowe properly carried out his duties as the appointed special judge in these proceedings. His December 13, 1995, order reflects a thoughtful, fair, unbiased evaluation of the best interest of Megan and Melissa.

Minix next alleges that he was denied due process in his liberty interest in the physical custody of his children. Due process requires, at the minimum, that each party be given a meaningful opportunity to be heard. Utility Regulatory Commission v. Kentucky Water Service Company, Inc., Ky.App., 642 S.W.2d 591, 593 (1982); Lynch v. Lynch, Ky.App., 737 S.W.2d 184, 186 (1987); See also Somsen v. Sanitation Dist. No. I of Jefferson County, 303 Ky. 284, 197 S.W.2d 410, 411 (1946). Exhaustive evidentiary hearings were held on July 20, 26 and 27, 1995, during which Minix presented numerous witnesses and was afforded the opportunity to cross-examine witnesses called by Wolfe. These hearings clearly afforded Minix a meaningful opportunity to be heard.

Minix next argues that Judge Lowe abused his discretion by failing to hold Wolfe in contempt "for manipulating the children." Wolfe argues that Minix's accusations are mere unfounded allegations. It is within a trial court's discretion whether to use its contempt power, Smith v. City of Loyall, Ky.App., 702 S.W.2d 838, 839 (1986). Even if Minix's allegations are taken as true, the trial court was within its discretion in declining to hold Wolfe in contempt.

Minix next argues that Judge Lowe should be removed from this case on the basis that he did not timely act on a filing and because various proceedings were held in Pike County, Judge Lowe's home circuit. There is simply no evidence that Judge Lowe failed to timely act in the manner suggested by Minix. In any event, at every stage of the proceeding any error or defect in the proceeding which does not affect the substantial rights of the parties must be disregarded. CR 61.01. Any error relating to holding the hearings in Pike County, rather than Johnson County, was non-prejudicial to Minix and, therefore, harmless. See Marsh v. Kentucky Farmers Bank, Ky.App., 714 S.W.2d 502. (1989). Absent a showing of bias or prejudice, there are no grounds for recusal. Supreme Court Rules (SCR)

4.300 Canon 3 (C)(1)(a); White v. Conunonwealth, Ky., 310 S.W.2d 277, 278 (1958); Lovett v. Commonwealth., Ky.App., 858 S.W.2d 205, 208 (1993). In the present case, Judge Lowe has conducted the proceedings in an exemplary manner. We find no bias or any other basis requiring Judge Lowe's recusal.

Minix next argues that the case should be returned to Johnson Circuit Judge James Knight because he cited no reason for disqualification when he removed himself from the case. As Minix has previously argued in this proceeding, once a judge has voluntarily disqualified himself from a matter, that judge loses the authority to actively participate in the absence of an agreement of the parties, and he has no authority to resume active participation or to enter any order in the case. See Wedding v. Lair, Ky., 404 S.W.2d 451 (1966). It would be improper for Judge Knight to return to the case absent an agreement among the parties. Minix formerly advocated this position. To now argue for the reappointment of Judge Knight, who has previously disqualified himself, reflects badly on Minix's credibility.

Lastly, Minix argues that he should be restored to the position he occupied prior to the issuance of the void orders by Judge Frazier. He requests restitution for "property taken," "support ordered," and "debts, costs and fees required to be paid." We agree with Wolfe that these issues are not properly preserved for appeal. CR 76.12 (b) (iv) requires a statement with reference to the record showing that an issue has been properly preserved for review. Minix cites only one specific reference to the record -- his January 2, 1996, Motion to Alter, Amend, or Vacate. However, this motion does not request the financial restitution specified on appeal. Errors to be considered for appellate review must be precisely preserved and identified in the lower court. Skaggs v. Assad ex rel. Assad, Ky., 712 S.W.2d 947 (1986). As Minix failed to do this, we are unable to review the merits of this argument.

We find it necessary to conclude this opinion with an admonition directed toward both Minix and his counsel. Where an appeal is frivolous, this Court may award just damages and single or double costs to the non-offending party pursuant to CR 73.02(4). See Raley v. Raley, Ky.App., 730 S.W.2d 531 (1987). Further, it is not just the offending party that is exposed to penalty. CR 11 places a burden upon counsel to make reasonable inquiry into the basis of an action, both legally and factually, and forbids the filing of an action for an improper purpose such as delay or harassment. The arguments advanced by Minix in this proceeding are largely frivolous. Certainly the repeated ad hominem attacks on Wolfe, the trial judge, and other judges who have served on this case are unfounded. While no penalties will be imposed at this time, in the future Minix, and particularly Minix's counsel, should confine their arguments to the legal issues and avoid abusive personal attacks.

The order from which this appeal is prosecuted is affirmed.

EMBERTON, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS IN RESULT.

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Philip D. McKenzie
Grayson, KY

BRIEF FOR APPELLEE:

Phillip Bruce Leslie
Greenup, KY

Supreme Court of Kentucky

98-SC-52-D
(96-CA-1880)

MARCUS S. MINIX — MOVANT

JOHNSON CIRCUIT COURT
V. 86-CI-10

SHERRY MINIX (now WOLF) — RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

Movant's motion to strike the response to the motion for discretionary review is denied. Movant's motion to supplement the record is granted.

The motion for review of the decision of the Court of Appeals is denied.

Stumbo, J., not sitting.

ENTERED August 26, 1998.

s/Robert F. Stephens

Chief Justice

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 94-C-A-2820-OA

MARCUS S. MINIX — PETITIONER

V. — ORIGINAL ACTION IN COURT OF APPEALS REGARDING JOHNSON CIRCUIT COURT

STEPHEN N. FRAZIER, JUDGE, JOHNSON CIRCUIT COURT — RESPONDENT

* * * * * * * *

ORDER GRANTING CR 76.36 RELIEF IN PART

BEFORE: LESTER, CHIEF JUDGE; DYCHE, AND MCDONALD, JUDGES.

The Court has considered petitioners petition for writ of mandamus and respondent's response thereto and, being sufficiently advised, ORDERS the petition be GRANTED IN PART.

Petitioner requests this Court, inter alia, to find that all orders and judgments entered by respondent in Marcus S. Minix v. Sherry Minix, action number 86-CI-000010, subsequent to his first voluntary disqualification on September 18, 1987, are void. Petitioner contends that, since respondent had previously disqualified himself from this case, he had lost jurisdiction and could not later resume participation in the same case. Petitioner further requests that this Court direct respondent to refer the matter to the Chief Justice for the appointment of a Special Judqe. Petitioner cites, as authority for the relief he seeks, KRS

26A.015; SCR 4.300; Wade v. Bondurant, Ky., 625 S.W.2d 847 (1981) and Weddington v. Lair, Ky., 404 S.W.2d 451 (1966). He claims that, due to respondent's failure to refer the matter to the Chief Justice, he cannot get relief from Sherry Minix's denial of visitation.

Initially, we note that the second prong of the relief sought bv petitioner is moot. Respondent referred the matter to the Chief Justice and the Chief Justice appointed a Special Judge, The Honorable Charles E. Lowe, Jr., by order entered December 5, 1994.

However, we are of the opinion that petitioner Is argument that respondent lost jurisdiction over the action below when he disqualified himself has merit.

Petitioner's dissolution proceedings were first assigned to respondent, Johnson Circuit Court, Division I. Subsequently, respondent disqualified himself and transferred the matter to Judge James A. Knight, Johnson Circuit Court, Division II. Judge Knight later recused himself. Respondent, then acting as Chief Regional Circuit Judge, attempted to assign a replacement but, apparently, was unable to do so and resumed participation in the case.

We agree with petitioner that a judge, once voluntarily disqualifying himself from a matter loses jurisdiction forever in the absence of an agreement of the parties, that he has no right to reassume jurisdiction and that any order entered by that judge,

upon resuming participation in the case, is a nullity. See Wade, supra., at 847; Weddington, supra., at 452-53. Consequently, The Honorable Charles E. Lowe, Jr., Special Judge, is hereby DIRECTED to enter an order VACATING all orders and judgments entered by respondent in action 86-CI-000010 subsequent to respondent's first voluntary disqualification from that case.

The Clerk of the Court of Appeals is DIRECTED to mail a copy of this order to The Honorable Charles E. Lowe, Jr., Judge of the Thirty-Fifth Judicial Circuit, Division II.

ENTERED: January 19, 1995.

s/ Charles B. Lester
CHIEF JUDGE, COURT OF APPEALS

D-1

RENDERED: AUGUST 24, 1995
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

95-SC-178-MR AND 95-SC-195-MR

STEPHEN M. FRAZIER, JUDGE
JOHNSON CIRCUIT COURT AND — APPELLANTS/CROSS APPELLEES

SHERRY MINIX
REAL PARTY IN INTEREST

APPEAL FROM COURT OF APPEALS
V. 94-CA-2820-OA

MARCUS S. MINIX — APPELLEE/CROSS APPELLANT

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from an order of the Court of Appeals which granted in part the petition of Marcus S. Minix for a writ of mandamus and directed Special Judge Charles E. Lowe, Jr., to vacate all orders and judgments entered by Judge Stephen N. Frazier after his first voluntary disqualification from the case.

The issue we face as a reviewing court is whether the recusal of Judge Frazier and his later resumption of the bench was improper so as to require his orders to be found void.

This Court affirms the decision of the Court of Appeals because once a judge has voluntarily disqualified himself from a matter, that judge loses the authority to actively participate in the absence of an agreement of the parties, and he has no authority to resume active participation or to enter any order in the case. Any order entered by the judge who attempts to resume active participation of the case is a nullity. Wade v. Bondurant, Ky., 625 S.W.2d 847 (1981); Wedding v. Lair, Ky., 404 S.W.2d 451 (1966).

In this case, there was no waiver agreement in writing in regard to the actions of Judge Frazier after his original disqualification. Waiver cannot be presumed from silence. It must be in writing or otherwise memorialized in the record. Small v- Commonwealth, Ky.App. , 617 S.W.2d 61 (1981). We do not accept the argument that Marcus Minix through his actions agreed to the resumption of the bench by Judge Frazier.

Once Judge Frazier voluntarily recused himself, he was expressly prohibited from exercising the power of Chief Regional Circuit Judge to appoint any special judge, including himself, to hear the case. Charter §IV.5. Such authority passed to the Vice-Chief Regional Circuit Judge. The procedure provided for in the Charter was not followed. As noted by Judge Johnstone in his concurring opinion, the Charter provides in pertinent part that it is the duty of the Vice-Chief Regional Circuit Judge to exercise the assignment authority whenever the Chief Regional Circuit Judge disqualifies himself.

This dissolution of marriage proceeding filed in 1986 was first assigned to Judge Frazier who then disqualified himself and transferred the matter to Judge James A. Knight of the Johnson Circuit Court. Judge Knight later recused himself. Judge Frazier, then acting as Chief Regional Judge, attempted to assign

a replacement judge but was unable to do so, and then resumed his own participation in the case.

In 1991, Judge Frazier assigned the case to Judge Asbury. In 1994, Judge Asbury disqualified himself, and on December 13, 1994, the Chief Justice appointed Special Judge Lowe. The case has also found its way to the Supreme Court on several occasions and review was denied on grounds other than are presented at this time. The original request of Marcus S. Minix for an appointment by the Chief Justice, pursuant to KRS 26A.015, is now moot by virtue of the order entered December 5, 1994 appointing Special Judge Lowe.

This Court has considered the various arguments put forward by the parties in this case. The husband originally challenged the constitutionality of the administration charter providing for the regional judge system as unconstitutional. The husband also requested this Court to certify various federal constitutional questions.

The wife argues that the husband failed to object to the resumption of the bench by Judge Frazier and should not be heard on this issue now. She also petitions this Court to reverse the judgment of the Court of Appeals and hold that all orders entered by Judge Frazier and Judge Asbury be enforced.

In view of our decision in this matter, we decline to decide any of these issues because they are either moot or irrelevant. Pursuant to separate orders of this Court, we have granted the motion to supplement the record and deny the motion to dismiss.

It is the holding of this Court that once a judge voluntarily disqualifies himself from a matter, he loses authority to actively participate for all purposes and that the judge has no right to

attempt to resume active participation. Any order entered by that judge upon attempting to resume participation in the case is a nullity. The order of the Court of Appeals granting in part a writ of mandamus pursuant to CR 76.36 is affirmed.

Stephens, C.J., and Fuqua, Lambert, Leibson, Reynolds and Wirtersheimer, JJ., concur. Stumbo, JJ., not sitting.

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